BATU BATA HUPE SOON SDN. BHD.

v.

DUBON CONSTRUCTION SDN. BHD.

HIGH COURT MALAYA, JOHOR BAHRU
LC VOHRAH J
[COMPANIES WINDING-UP NO. 28-53-1989]
29 MARCH 1990

CIVIL PROCEDURE: *Costs - Conditions of acceptance of settlement - Conduct and attitude of parties relevant.*

The petitioner sent notice under s. 218 of the Companies Act 1965 to the respondent for the balance of purchase price for goods sold and delivered. At the hearing the respondent's solicitors requested that the matter be struck out pursuant to a letter written by them to the petitioner's solicitors in which a cheque for part of the balance was enclosed. The petitioner then asked for costs, which the respondent objected to.

The question for determination was whether settlement had actually been needed by the parties when their Counsel appeared before the Court.

Held:
On the fact of this case, since the cheque had been received and cleared by the petitioner's solicitors and since it was not disputed by the petitioner that the sum made out in favour of them was accepted by them in "full and final settlement" of the claim except for the balance, Counsel for the petitioner was estopped from urging that if the costs were not paid by the respondent, he would not agree to the settlement and that the said letter would then only be a letter of offer.

[Petition struck out with no order as to costs.]

Legislation referred to:
Companies Act 1965, s. 218

Other source referred to:
Buckley on the Companies Acts, 14th Edn., Vol. I, p. 547

For the respondent/applicant - W.L. Lee; M/s. Adnan Sundra & Low
For the petitioner/respondent - B.C. Ong; M/s. Ong Ban Chai & Co.

JUDGMENT

LC Vohrah J:

The petition in this case (Encl. 2) was based upon a notice sent to the respondent by the petitioner pursuant to s. 218 of the Companies Act 1965 which demanded payment of the sum of RM96,393.20 "being the balance of the purchase price of goods sold and delivered." On the day fixed for the hearing of the petition that is 7 January 1990, Counsel for the respondent informed the Court that the matter had been fully settled and applied for the petition to be struck out. In support of this application she tendered a letter dated 28 December 1989 written by the solicitors for the respondent to the solicitors for the petitioner which laid down:

Dear Sirs,

Johor Bahru High Court

Companies (Winding-up) No. 28-53-1989

Batu Bata Hupe Soon Sdn. Bhd.

v.

Dubon Construction Sdn. Bhd.

HEARING: Sunday, 7 January 1990

We refer to the above matter and the telephone conversation between your Mr. Ong and our Ms. Lee on 22 December 1989 in respect of our respective clients' wishes to negotiate with a view to an amicable settlement.

We are pleased that it has been agreed that the dispute on the sum of RM18,575.20 be contended in the civil action taken out by your clients in the Johor Bahru Sessions Court Summons No. 52 75-1989-2 which we confirm is fixed for mention on 22 January 1990.

In respect of the sum of RM77,818 forming the crux of the negotiations, we have our clients' instructions to forward to you the said sum in one lump sum payment on the condition that your clients **withdraw** their Petition No. 28-53-1989 to wind up our clients on 7 January 1990.

Please find enclosed our clients' PBB Cheque No. 417190 dated 30 December 1989 drawn in your favour for the sum of RM77,818 as full and final settlement of your clients' claim against Dubon Construction Sdn. Bhd., except for the disputed sum of RM18,575.20 which is aforementioned in the second paragraph herein.

Kindly acknowledge receipt of the enclosed cheque by signing on the duplicate copy of this letter and returning the same to us.

We have further enclosed two copies of the duly approved draft order dated 14 December 1989 for your further action.

Yours faithfully,

Sgd."

Counsel for the petitioner did not dissent but asked for the costs of the petition and for authority referred to a passage in *Buckley on the Companies Acts*, Fourteenth Edn., Vol. I at p. 547 relating to costs of petitions dismissed by consent which read:

> If the company wishes to get rid of the petition, it must not only pay the petitioner's debt, but his costs of the petition as well.

He went on to say that if the costs were not paid by the respondent he (to adopt his own choice of language) did not agree to the settlement and the said letter would then amount only to a letter of offer.

Counsel for the respondent objected strenuously to the respondent having to pay costs and argued that what she was asking for was not a dismissal of the petition by consent but for the petition to be struck out because the matter had been settled.

The question I had to consider was whether settlement had actually been reached by the parties when their Counsel appeared before me on the date fixed for the hearing of the petition.

From the contents of the said letter it was clear that it came to be written as a result of a telephone conversation between Counsel for the petitioner and Counsel for the respondent for the purpose of negotiating an amicable settlement. It was equally clear that the said letter together with the accompanying cheque for the sum of RM77,818 was received by the solicitors for the petitioner on 29 February 1989 (See Exhibit 'B') and that the cheque was cleared by them on 2 January 1989 (See Exhibit 'C'). There was no demurrer on the part of the solicitors for the petitioner that the sum made out in favour of them was accepted by them in "full and final settlement" of the petitioner's claim against the respondent "except for the disputed sum of RM18,572.20" which was the exact difference between the sum demanded in the statutory notice and the sum made out on the cheque. In my view Counsel for the petitioner was estopped by the conduct of his solicitors from denying that they had accepted the payment of the sum of RM77,818 as a condition for the withdrawal of the petition at the date of hearing in full settlement of the petitioner's claim against the respondent except for their outstanding dispute relating to RM18,572.20 which was to be resolved in the Sessions Court. That being the case I decided that the petition could not be maintained and the petitioner was not entitled to costs. Accordingly I struck out the petition with no order as to costs.

Also found at [1990] 2 CLJ 201